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JAN 10 1989

December 29, 1988

Mr. Kenneth Marschner, Chief
Hazardous Waste Bureau
State of New Hampshire
Department of Environmental Services
6 Hazen Drive
Concord, New Hampshire 03301-6509

RE: OBLIGATION OF A FEDERAL FACILITY TO PAY THE
NEW HAMPSHIRE HAZARDOUS WASTE GENERATOR FEE

Dear Mr. Marschner:

By letter dated August 9, 1988, Pease Air Force Base, a federal facility located in New Hampshire, informed you that it considered itself exempt from payment of the hazardous waste quarterly fee imposed by RSA Section 147-B:8. You have asked whether a federal facility can properly claim such an exemption. It is our opinion that Pease Air Force Base, and any other federal facility operating and generating waste in New Hampshire, has an obligation to pay the generator fee in accordance with the New Hampshire Hazardous Waste Cleanup Fund Act.

There are two separate, but related, legal grounds on which we base this opinion. First, Section 6001 of the Resource Conservation and Recovery Act, codified at 42 U.S.C. § 6961, contains a comprehensive waiver of sovereign immunity. The waiver provision states specifically that all federal facilities shall be subject to, and comply with, all state requirements, both substantive and procedural, that concern the control and abatement of hazardous waste. Secondly, even assuming that the hazardous waste generator fee does not come within the scope of the sovereign immunity waiver provision of RCRA, the fee should qualify as a permissible "user fee," rather than being prohibited as an unconstitutional tax. A required payment is considered to be a user fee if it generates



revenues reasonably equivalent to services provided by or costs imposed on the State as the result of a certain type of use, in this case, as a result of hazardous waste generation.

As explained below, the scope of the RCRA waiver of sovereign immunity is currently a hotly contested issue. The district courts that have interpreted the waiver provision are in conflict. The most recent court decisions and, in our opinion, the best reasoned ones, conclude that the waiver was intended to be comprehensive. However, federal facilities located in New Hampshire will probably continue to challenge the State's authority to insist on compliance with its hazardous waste laws, until this question is resolved in the First Circuit Court of Appeals or the United States Supreme Court.

1. Waiver of Sovereign Immunity

The relevant part of the waiver provision in RCRA states as follows:

Each department, agency and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site or (2) engaged in any activity resulting, or which may result in the disposal or management of solid waste or hazardous waste shall be subject to and comply with all federal, state, interstate, and local requirements, both substantive and procedural (including any requirements for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.

42 U.S.C. 6961.

The United States District Court of Maine recently determined that generator fees imposed by the Maine Hazardous Waste Act are procedural requirements "respecting control and abatement" of hazardous waste and that RCRA authorizes the imposition of these fees on federal facilities. State of Maine v. The Department of the Navy, 86-0211-P (D.Me. Nov. 23, 1988). The Maine generator fee program is similar to the one in New Hampshire. Generator fees collected under the Maine statute are paid into the Maine Hazardous Waste Fund, the purposes of which are like those of the New Hampshire Hazardous Waste Cleanup Fund. Both statutes provide funding for the control of hazardous waste, whether through inspection, monitoring, or supervision (and in the case of New Hampshire, through the identification of potential hazardous waste facility sites), and for the abatement of contamination caused by the improper disposal of hazardous waste.

We have not found any other decision that explicitly discusses the constitutionality of state hazardous waste generator fees when imposed on a federal facility. A recent line of decisions does address whether states can recover civil and criminal penalties from federal facilities for violations of state hazardous waste statutes. To date, the California, Washington, North Carolina and Florida District Courts, as well as the Ninth Circuit, have narrowly construed the sovereign immunity waiver of RCRA § 6001 and have refused to subject the federal government to liability for civil and/or criminal sanctions under state hazardous waste laws. These decisions rest on a technical distinction between "substantive and procedural" requirements under the statutory provision (interpreted as the regulatory requirements of state hazardous waste law) and so-called "enforcement devices" (distinguished from the statutory "requirements," because they are the means by which requirements are enforced).

However, the two most recent cases found on the issue have rejected the above line of reasoning. Ohio v. The Energy Department, 27 E.R.C. 1377 (S.D. Ohio 1988); Maine v. Dept. of the Navy, *supra*. In both these decisions, the United States was found to be liable for civil penalties imposed as the result of violations of state hazardous waste requirements. The Ohio District Court decision has been appealed to the Sixth Circuit. We expect the Maine District Court decision to be appealed to the First Circuit.

One could argue alternatively that the generator fee is a "reasonable service charge" within the express language of the waiver provision and is expressly allowed under RCRA. However, an argument based on the statutory interpretation of "service charge" will tend to collapse into the constitutional argument that the generator fee qualifies as a user fee, not a tax. The meaning of "service charge" is hard to distinguish from that of "user fee." The user fee issue is discussed below.

2. User Fee v. Unconstitutional Tax:

As a general rule, one sovereign cannot impose taxes on another sovereign. However, "taxes that operate as user fees may constitutionally be applied." Massachusetts v. United States, 435 U.S. 444, 463 (1978) (determining the propriety of a federal assessment upon a branch of the State). The Supreme Court in Massachusetts v. United States developed a three-part test to determine when a levy of money by one sovereign against another is valid as a user fee: (1) the fees must not discriminate against interstate commerce, (2) they must be based upon some fair approximation of use, and (3) they must not be excessive in relation to the benefits provided by or the costs imposed on the taxing sovereign. Id., 435 U.S. at 464.

The first factor of this three-part test does not appear relevant in this case. The second factor requires only that the fee be allocated among users in a way that approximates the proportion of their respective use. Since each quarterly generator fee is tied to the amount of waste generated by the generator during the previous quarter, the hazardous waste fees appear to meet the second criterion.

The third factor asks whether the State's total receipts from hazardous waste generators under RSA Section 147-B:8 roughly approximate the costs imposed on the State as a result of hazardous waste generation and disposal within its borders and/or the cost of any benefits provided by the State to hazardous waste generators. Note that it is irrelevant whether the generator fees raised are themselves spent on the services provided to hazardous waste generators. The State may allocate its funds in any way it chooses. The only relevant question is whether the amount of revenue generated by the fees is roughly equivalent to the amount the State is likely to spend on services provided to hazardous waste generators or to offset costs imposed upon the State by hazardous waste generation.

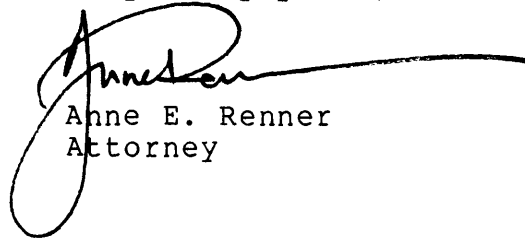
Determining what amount of state costs can be properly offset by § 147-B:8 revenues can be a complex factual question. We assume that the relevant state expenditures in this case exceed revenues from the generators fee. We would expect that the general expense of implementing and enforcing the State's hazardous waste regulatory program would be considered "costs imposed" on New Hampshire as a result of in-state hazardous waste generation, given the First Circuit's analysis of a similar question in New Hampshire Motor Transport v. Flynn, 751 F.2d 43 (1st Cir. 1984). In New Hampshire Motor Transport v. Flynn, the First Circuit determined that the New Hampshire hazardous material transporter license fees qualified as user fees and did not create an unconstitutional burden on commerce. In reaching its decision, the Court looked to the three-part test discussed above and indicated that it considered the cost of enforcing a state hazardous waste regulatory program against transporters as a cost that could be constitutionally offset by the license fee on hazardous waste transporters.

In our opinion, based on the above analysis, the State of New Hampshire can require Pease Air Force Base to pay the hazardous waste quarterly fee in accordance with RSA 147-B:8, retroactively to April 1, 1988, which was the date of its last payment.

Kenneth Marschner
December 29, 1988
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As you have requested, we have prepared a letter to Pease Air Force Base. I have enclosed a draft of this letter for your review and comments. Should you have any further questions, please let me know.

Very truly yours,

A handwritten signature in black ink, appearing to read "Anne E. Renner", with a long horizontal flourish extending to the right.

Anne E. Renner
Attorney

AER/jlc
Enclosure
cc: Wendy Waskin
O-88-46

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DRAFT

December 29, 1988

Bradford C. Vassey, Lt. Col.
Staff Judge Advocate
United States Air Force
Headquarters 509th Combat Support Group
Pease Air Force Base
New Hampshire 03803-5000

Dear Lt. Col. Vassey:

We have reviewed your claim that Pease Air Force Base is exempt from payment of the hazardous waste generators' fee, imposed by New Hampshire statute, RSA §147-B:8. We conclude that Pease Air Force Base is not exempt from the quarterly fee and that it must pay into the New Hampshire Hazardous Waste Cleanup Fund the fees outstanding since April, 1988, and all quarterly fees assessed in the future.

We reached this conclusion after giving careful consideration to both the statutory and the constitutional grounds you raised in support of exemption.

First, Section 6001 of the Resource Conservation and Recovery Act, codified at 42 U.S.C. §6961, contains a comprehensive waiver of sovereign immunity. The waiver provision specifically states that federal facilities "shall be subject to and comply with all federal, state, interstate and local requirements, both substantive and procedural, . . . respecting control and abatement of hazardous waste." As I am sure you know, the United States District Court of Maine recently determined that hazardous waste generator fees imposed under Maine statute to maintain the Maine Hazardous Waste Fund were procedural requirements respecting control and abatement of hazardous waste and were clearly within the intended scope of the RCRA sovereign immunity waiver clause. Maine v. Department of the Navy, 86-0211-P (D.Me. Nov. 23, 1988). An identical analysis applies in this case and New Hampshire's generator fees are likewise within the express scope of the statutory waiver of sovereign immunity.



Bradford C. Vassey, Lt. Col.
December 29, 1988
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Secondly, even if the fee did not come within the RCRA waiver provision, it qualifies as a permissible "user fee" under the rationale of Massachusetts v. United States, 435 U.S. 444 (1978). Since each quarterly fee is tied to the amount of waste generated by a generator during the previous quarter, the hazardous waste fees are based upon a fair approximation of use. In addition, the in-state generation and disposal of hazardous waste by facilities such as Pease Air Force Base imposes significant costs on the State of New Hampshire. The cost of enforcing the state hazardous waste regulatory program is only part of these costs, among which are the siting and development of new hazardous waste facilities, and the containment of discharged material. Given the overall expense of running the state hazardous waste program, it is highly unlikely that the revenues collected through the generator fees would be considered excessive in relation to that expense. See New Hampshire Motor Transport v. Flynn, 751 F.2d 43 (1st Cir. 1984) (N.H. hazardous material transporter license fee is a constitutional user fee).

Kindly arrange for payment of all outstanding hazardous waste generator fee invoices as soon as possible. Please feel free to call me at (603) 271-3679 if you would like to discuss these issues further.

Very truly yours,

Anne E. Renner
Attorney

AER/jlc
cc: Kenneth Marschner, DES